IP 01-0844-C T/K Morrison v. O'Hair
Judge John D. Tinder Signed on 3/29/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MORRISON, WILLIAM E, MORRISON, SONYA R, Plaintiffs, vs. O'HAIR, DENNIS D* DISMISSED 3/29/02, WALTON, DONALD T* DISMISSED 3/29/02, MCFARLAND, GENE INDIVIDUALLY AND AS BOARD OF COMMISSIONERS OF PUTNAM COUNTY INDIANA* DISMISSED 3/29/02, MOORE, DAVID, DAVIS, JOHN K, PUFFERS, TERRY, WALTERS, STEVE INDIVIDUALLY AND AS BOARD OF TRUSTEES OF THE TOWN OF CLOVERDALE INDIANA, HARRISON, LISA INDIVIDUALLY AND AS ENVORONMENTAL ENFORCEMENT OFFICER OF PUTNAM COUNTY* DISMISSED 3/29/02, PEARSON, DON INDIVIDUALLY AND AS CHIEF OF POLICE OF THE TOWN OF CLOVERDALE INDIANA, MCFADDEN, PAT INDIVIDUALLY AND AS INVESTIGATOR OF THE TOWN OF CLOVERDALE INDIANA, JONES, BRICE, Defendants.	CAUSE NO. IP01-0844-C-T/K

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WILLIAM E. MORRISON and SONYA R. MORRISON,	)	
Plaintiffs,	)	
vs.	)	IP 01-0844-C-T/K
DENNIS D. O'HAIR; DONALD T. WALTON; GENE McFARLAND, Individually and as Board of Commissioners of Putnam County, Indiana; DAVID MOORE, JOHN K. DAVIS, BRICE JONES, TERRY PUFFER, STEVE WALTERS, Individually and as Board of Trustees of the Town of Cloverdale, Indiana; LISA HARRISON, Individually and as Environmental Enforcement Officer of Putnam County; DON PEARSON, Individually and as Chief of Police of the Town of Cloverdale, Indiana; PAT McFADDEN, Individually and as Investigator of the Town of Cloverdale, Indiana,	)	
Defendants.	)	

Entry on Motion to Dismiss[1]

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

Defendants, Dennis O'Hair, Donald T. Walton, Gene McFarland, and Lisa Harrison (collectively "County Defendants"), have filed a motion to dismiss.

I. The Allegations

Plaintiffs, William E. Morrison and Sonya R. Morrison, husband and wife, brought this action under 42 U.S.C. § 1983 against the Defendant Board of Commissioners of Putnam County ("County"), allegedly the final policymakers of the County, for making decisions that affect the private use of Plaintiffs' real and personal property in the County, and Board of Trustees of the Town of Cloverdale, Indiana ("Town"), allegedly acting as the Town Council and the final policymakers of the Town for making decisions affecting the private use of Plaintiffs' real and personal property within the Town and within a two-mile fringe area outside the Town. (Compl. ¶¶ 1, 2.) Plaintiffs seek to recover compensatory damages, jointly and severally, against all Defendants to redress alleged deprivations of their rights, privileges and immunities protected by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and federal law, allegedly denied by Defendants by the adoption and enforcement of certain ordinances and regulations. (*Id.* ¶ 2.)

Plaintiffs are residents of the County and own a 35 acre farm located at 2741 E. State Road 42 within the two-mile fringe area of the Town, and currently reside at 202 Doe Creek Drive in the Town. (Compl. ¶¶ 4, 14.) In addition to their farm and residence, they own a "dwelling unit apartment" at 154 North Grant Street, their home at 202 Doe Creek

Drive, their 35 acre farm at 2741 East State Road 42, and a 3.25 acre commercial site located at the "Cloverleaf Interchange" at Interstate I-70 at its intersection with Highway 231, two miles from downtown Cloverdale, and an additional 4.483 acres. (*Id.* ¶ 14 & 14(i).) On their commercial site at 2007 North Main Street, Plaintiffs caused to be constructed the Midway Motel, a restaurant named the Long Branch Saloon, and their trucking business known as the "Blue Lightning Express, Inc." (Compl. ¶ 14(e)-(g).) The local newspaper on August 12, 1999, published an article estimating that the land at the Cloverleaf Interchange, without any improvements thereon, would bring at least $200,000 an acre. (*Id.* ¶ 14(j).) Plaintiffs invested $160,000 in the purchase of tractors and trailers for their trucking business. (*Id.* ¶ 14(k).) Plaintiffs' use of their real estate was the highest and best use reasonably adapted to the market place and their use was compatible with similar uses by their neighbors, and no neighbor ever complained to an enforcement officer. (*Id.* ¶ 15.)

Defendants are all residents of the County. (Compl. ¶¶ 4, 5.) Defendants, Dennis D. O'Hair, Donald T. Walton, and Gene McFarland, at all times relevant acted as the Board of Commissioners of the County, and did so under the color of their official capacity as commissioners. Their acts were performed under the color of the County Ordinances they adopted to eliminate illegal open dumping. Said ordinances provided for enforcement by County officers who were delegated to act for the Commissioners in deciding what acts of the Plaintiffs constituted a violation of the ordinances. (*Id.* ¶ 6.) On August 2, 1993, the Commissioners adopted Ordinance Number 1993-1 entitled "An Ordinance Prohibiting

Illegal Dumping," with a stated purpose "to prohibit illegal dumping of solid waste materials in Putnam County, to establish penalties therefor, and to provide for the method of clean-up of open dumps." (*Id.* ¶ 7 & Ex. 1 at 1.) Ordinance 1993-1 defined the "West Central Solid Waste District" to mean "the legally constituted solid waste district of which Putnam County is a member pursuant to Indiana Code 13-9.5-2." (*Id.* ¶ 7 & Ex. 1, art. III, ¶ 17.) Ordinance 1993-1 provides that "[i]t shall be the duty of the Health Officer of Putnam County to enforce the Ordinance" (Compl. ¶ 8 & Ex. 1, art. VI, ¶ 1) and that "[t]he Health Officer is authorized to perform inspections in furtherance of fulfilling his/her duty to enforce the Ordinance. . . ." (*Id.*). The Health Officer of the County was Dirk Andres, later replaced by Defendant Lisa Harrison, now titled the Environmental Sanitarian and Enforcement Officer of the County. (*Id.* ¶ 9.)

The Town is incorporated and chartered by the State of Indiana. The individual Board of Trustees Defendants act as the Town Council and adopt Town ordinances. On July 25, 1994, the Trustees, in their official capacities, adopted Ordinance 1994-10, entitled, "An Ordinance Concerning Nuisances" with the stated purpose "that nuisances be defined and controlled within the community." (Compl. ¶ 10 & Ex. 2 at 1.) The Ordinance 1994-10 allegedly authorizes Town officers to trespass upon private property where in their opinion a nuisance exists and to abate such nuisance by providing that "all necessary officers, agents, and employees of the Town of Cloverdale may enter onto the property upon which such nuisance exists, [and] take any and all appropriate, necessary and convenient action to abate said nuisance." (*Id.* ¶ 11 & Ex. 2, § V(d).) Defendant Don

Pearson is the Chief of Police of the Town to whom was delegated the right to enter onto the private property of the Morrisons, without permission or a search warrant to determine whether a nuisance exists, regardless of whether anyone complained, and to take all action to abate said nuisance. (*Id.* ¶ 12.) Under Ordinance 1994-10, the expense of abating a nuisance is to be payable to the Town "by the persons responsible for the nuisance and shall be a lien against the property, including the entire lot, parcel or tract of real estate, upon which said nuisance existed." (Compl. ¶ 13 & Ex. 2, § V(d).)

Count One of the Complaint purports to allege a conspiracy against Defendants. "Beginning on or about 1988-1989, the exact date not known to the Morrisons but well known to the Defendants, two or more of the individual Defendants conspired, directly or indirectly, and induced the other Defendants to conspire with them to harrass (sic) and injure the Morrisons, with the object of said conspiracy being the economic destruction of the Morrisons as herein alleged." (*Id.* ¶ 16.) The Complaint alleges the following as overt acts of the conspiracy: (1) Defendants and their enforcement officers including the Town Police Department and County Sheriff's deputies, began parking at the entry way of the Long Branch Saloon to harass its customers by stopping them for sobriety checks; (2) on October 31, 1996, the County Sheriff admitted at the Sheriff's Judicial Sale Bank Foreclosure Sale of 4.483 acres owned by Plaintiffs that he did not properly advertise the 3.49 acre parcel, but allowed the sale to stand, even though the sale did not pay off the mortgage or compensate Plaintiffs for the fair market value of the property; (3) the Town police trespassed to park in the driveway of Plaintiff's farm to issue traffic citations to those

who ran a stop sign and told one person that Plaintiffs were complaining about their neighbors who failed to stop at the stop sign, which was false and fabricated by the police department; (4) Defendant Pat McFadden, a Police Investigator for the Town, on or about January 2001, confronted one or more drivers of Plaintiff's business and told him that he should not work for Plaintiffs because they were hauling drugs from Laredo, Texas, which was false and known to be false, libelous and malicious and adversely impacted Plaintiffs' ability to recruit drivers (Compl. ¶ 18(a)-(d)); (5) on June 1, 1994, the Town by Jack R. Woodruff, an attorney, sent a zoning violation notice to William Morrison, giving notice to "remove the disabled and abandoned milk truck and all other junk from your property situated north of interstate 70 on the west side of highway 231" (*id.* ¶ 18(e) & Ex. 4.); (6) on February 27, 1995, the Town Council sent a notice to Mr. Morrison stating violations of Ordinance # 1994-10 were found on the property at 154 North Grant Street and giving notice that the failure to respond would result in the Town taking action pursuant to the penalty section of the Town Ordinance (*id.* ¶ 18(f) & Ex. 5.); (7) on May 15, 1995, the Town Council sent a notice to Mr. Morrison stating that violations of Ordinance # 1994-10 were found on the property at 154 North Grant Street (*id.* ¶ 18(g) & Ex. 6); (8) on December 1 and 12, 1997, the Town by its Clerk-Treasurer sent notices of violations of Ordinance No. 1994-10 as to an apartment at 154 North Grant, 4 South Lafayette (*id.* ¶ 18(h) & Ex. 7); (9) on February 21, 2001, Defendant Lisa Harrison, sent a notice to Mr. Morrison enclosing a "Putnam County Open Dumping Ordinance highlighted with the items you are in violation of. . . ." (*id.* ¶ 18(i) & Ex. 8); (10) on May 29, 2001, the Town ran a Public Notice in "The

Hoosier Topics" that "Beginning June 1, 2001, the Cloverdale Police Department will be making inspections of properties in the corporate limits that are currently in violation of Nuisance Ordinance #1994-10 (*id.* ¶ 18(j) & Ex. 9); and (11) on June 7, 2001, the Town by its Clerk-Treasurer sent a notice of violations of Ordinance No. 1994-10 as to nuisance violations at 2007 North Main Street, where the Midway Motel, Long Branch Saloon and Plaintiffs' trucking company are located. (Compl. ¶ 18(k) & Ex. 10.)

Beginning in 1994 and continuing to the present, Dirk Andres and then Lisa Harrison, as enforcement officers under Ordinance Number 1993-1, the Town Marshal and the Town Chief of Police, allegedly trespassed upon Plaintiffs' property without a search warrant to look for violations in order to issue citations to levy fines and expenses, and to impose liens against Plaintiffs' property, and engaged in a pattern of continuing harassment of Plaintiffs. (Compl. ¶ 19.)

Ordinance No. 1-1994 adopted by the Trustees was based on an Indiana statute which has been repealed. (*Id.* ¶ 20.) The County Ordinance No. 1993-1 was based on an Indiana statute which was amended requiring the County to establish a "joint solid waste management district," which it did not, and all other powers exercised against Plaintiffs were repealed. (*Id.* ¶ 21.) By implication of the repealing of the statutory authority, the Ordinances of the Commissioners and Trustees were repealed, which was or should have been known to Defendants. (*Id.* ¶ 22.) "As a direct and proximate result of the tortious and unauthorized acts of the Defendants," (*id.* ¶ 23), as well as the alleged violation of their

constitutional rights (*id.* ¶ 24), Plaintiffs suffered damages, namely the destruction of the Midway Motel, loss of their 4.483 acres, loss of the fair and reasonable market value of the 4.483 acres, diminution in value of their trucking business, and loss of rentals from the Long Branch Saloon. (*Id.*(a)-(e).)

II. Standard for 12(b)(6) Motion

When ruling on a motion to dismiss under Rule 12(b)(6), the court accepts all the factual allegations in the complaint and draws all reasonable inferences from the facts in favor of the plaintiffs. *See Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). The motion may be granted only if the plaintiffs could prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Sanville v. McCaughtry*, 266 F.3d 724, 732 (7th Cir. 2001). "[I]f it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate." *Sanville*, 266 F.3d at 732.

III. Analysis

Plaintiffs bring their claims against Defendants under § 1983. To sufficiently plead a claim under § 1983, Plaintiffs must allege that they were "deprived of a federal right and that the deprivation was imposed upon [them] by a person acting under color of state law." *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)); *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). "These elements may be put forth in a 'short and plain statement of the claim showing that the pleader is entitled to relief. . . .'" *Alvarado*, 267 F.3d at 651 (quoting Fed. R. Civ. P. 8(a)(2)).

The County Defendants move to dismiss, raising several arguments: (1) the conspiracy claim includes allegations that are time-barred, are against independent agents and are not constitutionally cognizable; (2) none of the discreet acts alleged against these Defendants or their agents is actionable; (3) Defendants in their individual capacities are entitled to qualified immunity, and the Defendant commissioners are also entitled to legislative immunity; and (4) all claims are unripe under either the Fifth or Fourteenth Amendments.

The court necessarily addresses the ripeness argument first as it challenges whether the court has subject matter jurisdiction over this action. *See Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000).[2] The Fifth Amendment states in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const.

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[2] Plaintiffs argue that the court has jurisdiction under 28 U.S.C. § 1343(a)(3) and the failure to allege an adequate § 1983 claim does not deprive the court of jurisdiction, citing *McKenzie v. City of White Hall*, 112 F.3d 313, 316 (8th Cir. 1997). Section 1343(a)(3) grants the court jurisdiction over claims alleging that persons acting under color of state law have violated the Constitution of the United States or a federal statute providing for equal rights. Even if a court has original jurisdiction over an action pursuant to § 1343, the Complaint nevertheless must state a claim. *See id.*

Plaintiffs also argue that it is very difficult to dismiss a claim for lack of subject matter jurisdiction, citing *Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir. 1997). Difficult, but not impossible. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requires dismissal for lack of subject matter jurisdiction of a takings claim that is not yet ripe. *See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (indicating that subject matter jurisdiction is lacking when ripeness requirements of *Williamson* not met); *Bateman v. City of West Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996) ("The issue whether a claim is ripe for review bears on the court's subject matter jurisdiction. . . .").

amend. V, § 4. The Fifth Amendment is applicable to the States through the Fourteenth Amendment. Defendants argue that Plaintiffs' takings claims are not ripe and should be dismissed. They are correct.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court held that a takings claim under the Fifth Amendment was unripe unless the plaintiff avails himself of an adequate state procedure for seeking just compensation but is denied just compensation. *Id.* at 194-97; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) ("A federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy."); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002); *Forseth v. Village of Sussex*, 199 F.3d 363, 368, 372-73 (7th Cir. 2000). The Complaint makes no allegation that Plaintiffs have availed themselves of any state procedure and that they were denied just compensation under such procedure. Thus, Plaintiffs' takings claims should be dismissed as unripe.

The question then becomes whether any of Plaintiffs' claims are *not* subject to dismissal based on the lack of ripeness. But for the few exceptions discussed below, all of Plaintiffs' claims are takings claims and, therefore, are subject to dismissal for lack of ripeness. The Complaint alleges that the Defendant Commissioners and Trustees affected Plaintiffs' real and personal property, and other allegations reveal that the

essence of Plaintiffs' claims are the alleged adverse impact on their property. (*See* Compl. ¶¶ 14, 15, 18(b)-(k), 24.). The only claims that are not takings claims are the claims that Defendant Harrison trespassed, that Defendants and their enforcement officers parked at the entry way of the saloon to harass customers, that Town police trespassed to park on Plaintiffs' driveway and told one person Plaintiffs had complained about their neighbors failing to stop at a stop sign, and Investigator McFadden's alleged statement about drugs.

As for the claim that Defendants and their "enforcement officers," the Town Police, or the "sheriff's deputies" parked their cars at the entryway to the saloon to harass customers by stopping them for sobriety checks, Plaintiffs have not stated a claim against the County Defendants. Plaintiffs lack standing to bring this claim. *Estate of Johnson by Castle v. Village of Libertyville*, 819 F.2d 174, 178 (7th Cir. 1987) ("Plaintiffs must assert their own legal rights and interests.") (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Even if Plaintiffs' had standing to bring this claim, the Commissioners have no control over the county sheriff and, thus, the Commissioners cannot be liable for the alleged wrongful acts of the sheriff or his deputies. *Radcliff v. County of Harrison*, 627 N.E.2d 1305, 1306 (Ind. 1994); *Delk v. Bd. of Comm'rs of Delaware County*, 503 N.E.2d 436, 440 (Ind. Ct. App. 1987). *Respondeat superior* cannot provide a basis for § 1983 liability against the commissioners in any event. *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978). Clearly, the County Defendants have no control over the Town police or the Town Investigator, McFadden, and cannot be held liable for their alleged actions. This

leaves only the claims against Defendant Harrison remaining against the County Defendants, which is discussed below.

Furthermore, the claim based on the allegations relating to the sheriff's foreclosure sale are time-barred. The Complaint alleges that the sale occurred on October 31, 1996. The statute of limitations for § 1983 claims, borrowed from Indiana's limitations for personal injuries, is two years. *See Wilson v. Garcia*, 471 U.S. 261 (1985); Ind. Code § 34-11-2-4. The Complaint was not filed until June 13, 2001, clearly beyond the limitations period for a § 1983 claim based on the foreclosure sale and inadequate advertising related thereto.

With respect to the claims against the Commissioners in their individual capacities, these claims should be dismissed for failure to allege personal responsibility. As the Seventh Circuit said: "To establish an individual capacity claim under section 1983 against a supervisory official, there must be a showing that the official was directly responsible for the improper conduct," *McPhaul v. Bd. of Comm'rs*, 226 F.3d 558, 566 (7th Cir. 2000) (citing *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983)), "and 'knowingly, willfully, or at least recklessly caused the alleged deprivation by [her] action or failure to act.'" *McPhaul*, 226 F.3d at 566 (quoting *Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986)). A plaintiff need not show direct participation in the deprivation by a defendant. *McPhaul*, 226 F.3d at 566. "An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's

constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Id.* (quoting *Rascon*, 803 F.2d at 8274 (quoting *Smith v. Rowe* , 761 F.2d 360, 369 (7th Cir. 1985))).

The only allegation regarding the Commissioners is that they passed ordinances to eliminate illegal open dumping. The Complaint alleges that one ordinance was based on a state statute that was amended and by implication repealed, which was or should have been known by the Commissioners. No allegation in the Complaint involves the Commissioners' participation in or responsibility for a constitutional deprivation. An allegation that the Commissioners violated state law, without more, is an insufficient basis for a § 1983 claim. *See Pasiewicz v. Lake County Forest Preserve Dist.*, 270 F.3d 520, 526 (7th Cir. 2001); *Estate of Novack ex rel. Turbin v. County of Wood*, 226 F.3d 525, 531-32 (7th Cir. 2000); *Martin v. Tyson*, 845 F.2d 1451, 1455 (7th Cir. 1988).

Furthermore, the Complaint fails to allege facts that if true would establish that the mere passage of the ordinances by the Commissioners caused Plaintiffs any injury. The Complaint does not allege that the ordinances were enforced (other than the implication of enforcement by the sheriff's sale which action is time-barred). Paragraph 23 of the Complaint alleges that Plaintiffs suffered great stress, emotional trauma, and mental anguish as a result of the "tortious and unauthorized acts of the Defendants," but the Constitution does not incorporate all torts. *See Archie v. City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988). Moreover, the Commissioners would be entitled to legislative

immunity, even if improperly motivated, because the Commissioners acted in their legislative capacity in passing the ordinances. *See Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) ("Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities."); *Biblia Abierta v. Banks*, 129 F.3d 899, 906 (7th Cir. 1997) ("we conclude that Alderman William Banks and former Alderman Patrick Huels are absolutely protected by the legislative immunity doctrine for introducing and voting on rezoning ordinances and for requesting continuances of the ZBA hearings"). For all these reasons, the motion to dismiss should be granted with respect to the Commissioners in their individual capacities.

As for the official capacity claims against the Commissioners, those claims are effectively claims against the County. *See Kentucky v. Graham*, 473 U.S. 159, 169, (1985); *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978).[3] "A municipality may not be held vicariously liable, under § 1983, for the unconstitutional acts of its employees." *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 817 (7th Cir. 2001); *Monell*, 436 U.S. at 694. To allege municipal liability under § 1983, a plaintiff must allege that "(1) the [municipality] had an express policy that, when enforced, causes a constitutional deprivation; (2) the [municipality] had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled

[3] Plaintiffs correctly assert that municipalities and other local government units are "persons" within the meaning of § 1983. *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978); *Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 (7th Cir. 1994). Defendants, however, have not disputed that they may be sued under § 1983. Instead, they challenge the sufficiency of the Complaint's allegations against them.

as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority." *McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000); *see also Billings*, 259 F.3d at 817.

Plaintiffs allude to an unexpressed municipal policy, but the Complaint lacks any allegation of an unexpressed municipal policy. Though the policy itself may be unexpressed, the allegation of an unexpressed municipal policy must be made. *Warner v. City of Terre Haute, Ind.*, 30 F. Supp. 2d 1107 (S.D. Ind. 1998), upon which Plaintiffs rely, is inapposite as that case was decided on a motion for summary judgment rather than a motion to dismiss. Recognizing that a plaintiff can show municipal liability by proving that injury resulted from enforcement of an unexpressed municipal policy is one thing; requiring that a complaint state a claim upon which relief can be granted is another. Plaintiffs correctly maintain that a municipality may be held liable where the final policymaker's acts cause the alleged constitutional harm. *See*, *e.g.*, *McCormick*, 230 F.3d at 324. However, merely alleging that a defendant is a final policymaker is not enough, the complaint must allege a causal connection between the final policymaker's alleged act and the alleged harm.

Even under the liberal notice pleading standard, the Complaint fails to sufficiently plead a § 1983 claim against the County as it contains no allegation of a policy or custom of the County or that the Commissioners caused any alleged constitutional injury.

Therefore, the claims against the Commissioners in their official capacities should be dismissed.

As for Defendant Harrison, the Complaint alleges that beginning in 1994 and continuing to the present, she trespassed on Plaintiffs' private property in violation of their constitutional rights "without a search warrant, to look for violations in order to issue citations to levy fines and expenses, and to impose liens against their property to be paid by the Morrisons and engaged in a pattern of continuing harassment of the Morrisons. . . ." (Compl. ¶ 19.) The Complaint also alleges that Harrison gave Plaintiffs a notice of a violation of an ordinance. Defendants contend that neither allegation is sufficient to plead a § 1983 claim. The court agrees. The notice is an insufficient basis for a § 1983 claim as the Complaint fails to allege that Plaintiffs took any action to their detriment because of the notice or that any action was taken against them as a result of the notice. In other words, Plaintiffs have not alleged that the notice deprived them of any constitutionally protected rights.

The Seventh Circuit recently rejected the argument that all trespasses constitute Fourth Amendment violations. *United States v. Tolar*, 268 F.3d 530, 532 (7th Cir. 2001) (holding that agents did not violate the fourth amendment by entering onto defendant's business premises to find the owner and ask permission to search), *cert. denied*, 122 S. Ct. 1174 (2002). The court said that a "trespass is neither necessary nor sufficient for constitutional purposes." *Id.*; *see also Andree v. Ashland County*, 818 F.2d 1306, 1315 (7th Cir. 1987) (stating that a trespass by itself does not necessarily constitute a § 1983

violation) (citing *Oliver v. United States*, 466 U.S. 170 (1984)). The Fourth Amendment focuses on whether there is a "'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). The Amendment does not protect what a person "knowingly exposes to the public," *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)), or that which is within an "open field." *Oliver v. United States*, 466 U.S. 170 (1984); *Andree*, 818 F.2d at 1315. Thus, mere allegation of trespass by Harrison, without more, is insufficient to state a deprivation of a Fourth Amendment right. The Complaint fails to contain a statement of any more which would show that the Plaintiffs are entitled to relief against her. Therefore, the claims against Defendant Harris should be dismissed for failure to state a claim.

In *Kunik v. Racine County, Wisconsin*, 946 F.2d 1574 (7th Cir. 1991), the Seventh Circuit held that to state a conspiracy claim under 1983, a complaint must contain "allegations that the defendants directed themselves toward an unconstitutional action by virtue of a mutual understanding." *Id.* at 1580 (quotation omitted). In addition, such allegations "must further be supported by some factual allegations suggesting a meeting of the minds." *Id.* (quotation omitted). Thus, a complaint must specifically allege the "who, what, when, why, and how" of the alleged conspiratorial agreement. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1016 (7th Cir. 2000). Vague and conclusory allegations of a conspiracy are insufficient to state a claim. *See Amundsen v. Chicago Park Dist.*, 218 F.3d 712, 718 (7th Cir. 2000).

The Complaint alleges: "Beginning on or about 1988-1989, the exact date not known to the Morrisons but well known to the Defendants, two or more of the individual Defendants conspired, directly or indirectly, and induced the other Defendants to conspire with them to harrass (sic) and injure the Morrisons, with the object of said conspiracy being the economic destruction of the Morrisons as herein alleged." (Compl. ¶ 16.) This conspiracy allegation is vague and conclusory. It fails to sufficiently allege the who, what, when, why and how of the alleged agreement. The allegations of overt acts do not fill in the blanks of this conspiracy claim. And, the Complaint is devoid of any allegations that hint of a "meeting of the minds" amongst Defendants. Therefore, the Complaint fails to state a conspiracy claim under § 1983.

In response to the County Defendants' motion to dismiss, Plaintiffs state that Defendants did not file an Answer or any affidavits in support of their motion. The Federal Rules of Civil Procedure expressly provide that a motion asserting lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted "shall be made before pleading if further pleading is permitted." Fed. R. Civ. P. 12(b). Affidavits in support of such a motion are not required; a court generally may not rely on matters outside the pleadings when ruling on a motion to dismiss for failure to state a claim. *See Jacobs v. City of Chicago*, 215 F.3d 758, 766 (7th Cir. 2000).

For all of these above-stated reasons, the County Defendants' motion to dismiss will be granted. Plaintiffs assert that there is no basis for the court to dismiss the Complaint with prejudice at this stage of the proceedings. However, the County

Defendants' motion to dismiss has been pending for some months now. Though the motion to dismiss pointed out clear legal deficiencies in the Complaint (and deficiencies were pointed out in the motion for judgment on the pleadings filed by the other Defendants), Plaintiffs made no effort to correct those deficiencies. They did not and have not sought leave to amend their Complaint to sufficiently state a claim against the County Defendants. Even if they had, Plaintiffs' memorandum opposing the motion to dismiss has given the court no reason to believe that Plaintiffs would be able to sufficiently state a claim against the County Defendants. Accordingly, the court finds that but for the takings claims, the dismissal should be with prejudice; the takings claims will be dismissed without prejudice under Rule 12(b)(1) for lack of subject matter jurisdiction.

IV. Conclusion

The County Defendants' motion to dismiss will be GRANTED. All takings claims against Defendants O'Hair, Walton, McFarland, and Harrison, both individually and in their official capacities, will be dismissed without prejudice under Rule 12(b)(1) for lack of subject matter jurisdiction. All other claims against these Defendants, both individually and in their official capacities, will be dismissed with prejudice.

The court finds that there is no just reason for delay and, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, directs the entry of judgment with regard to all claims against the County Defendants in accordance with the rulings herein.

The motion for judgment on the pleadings filed by the remaining defendants will be addressed in a separate entry.

ALL OF WHICH IS ORDERED this 29th day of March 2002.

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John Daniel Tinder, Judge
United States District Court

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